INDEX.

	Page
Opinions below	1
Jurisdiction	2
Statement of the case	2
Errors intended to be urged	8
The questions involved	9
Resolution involved	9
Summary of argument	10
Argument	12
I. The Joint Resolution does not provide for the discharge of that part of the obligation in question which provides for the payment of rent, at the option of the debtor, by the delivery of a quantity of gold bullion	13
A. The operation of the Resolution is confined by its terms to obligations "payable in money of the United States"	13
B. The terms of the provision for the discharge of certain money obligations "dollar for dollar" themselves necessarily restrict the operation of the Resolution to obligations payable in dollars	15
II. The meaning of the term "equivalent" as used in the indentures	17
A. Opinion of the Court below	17
B. The sense in which the parties must be taken to have employed the word "equivalent" in the indentures	18
1. $1500 in devaluated paper currency would not constitute the full equivalent of the gold bullion specified in the typical indenture, according to the intention of the parties	18

Page

2. The conception of equivalence, as between gold bullion and gold coin, embodied in Stat. 1873, c. 131 20

3. The ordinary and usual meaning of equivalence, as between gold bullion and paper currency 22

4. An alternative measure of equivalence between gold bullion and currency which may be found to have been adopted by the parties is that amount of currency which the gold bullion should be worth in a free market 26

C. The measure of equivalence contended for by the debtor is contrary to the intention of the parties 27

D. The measure of equivalence adopted by the Courts below 29

III. Neither the Joint Resolution nor any other valid legislative or executive act has the effect of prohibiting the discharge of the undertaking to pay the equivalent of the gold in currency, according to the terms of that undertaking 31

A. The essential error in the decision of the Circuit Court of Appeals 31

B. The plain meaning of the terms of the Joint Resolution does not provide for its application to a provision for the payment of a sum of money to be measured by a quantity of gold bullion until the amount of money has been determined 33

1. Obligations "payable in money of the United States" 34

2. Restrictive effect of the phrase "dollar for dollar" 35

Page

3. The currency equivalent is not to be measured by gold coin 36
4. This Court has not decided that an obligation to pay an amount in money measured by gold bullion is within the terms of the Joint Resolution 37

C. If, looking solely at the face of the Resolution, there be doubt whether or not its terms affect an obligation to pay the currency equivalent of a quantity of gold bullion, that doubt is removed by reference to relevant evidence beyond the corners of the act 38
1. The debates in Congress 38
2. The Report of the Committee 41

D. Congress has no power to affect the discharge, according to its terms, of an undertaking to pay an amount in money measured by gold as a commodity 42
1. The adoption by private parties of a commodity standard of value is not within the field of the power of Congress to regulate the value of money 42
2. Even if the contractual adoption of a non-monetary standard of value is not per se beyond the domain of the currency power of Congress, it may be seriously doubted whether interference with such an adoption would, on June 5, 1933, have had a reasonable relation to the end which Congress then had in view 46

E. The Joint Resolution, if so applied as to permit the discharge of these contracts

Page

under the decree of the Court below, bears no reasonable relation to the exercise of the powers of Congress over the currency, by reason of the perpetually executory nature of these contracts 50

F. No legislation or executive action other than the Joint Resolution has the effect of reducing the currency equivalent stipulated for 57

Conclusion 62

Appendix A—Joint Resolution 63

AUTHORITIES CITED.

Addy v. United States, 264 U.S. 239 54

Adkins v. Children's Hospital, 261 U.S. 525 49, 55, 56, 57

Ames v. Quimby, 96 U.S. 324 18, 26, 27, 46

Atty. General v. Old Colony R.R., 160 Mass. 62 48

Bigelow v. Windsor, 1 Gray, 299 60

Bronson v. Rodes, 7 Wall. 229 34, 35, 42, 46

Case v. Mountain Timber Co., 210 Fed. 565 60

Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 50

Emery Bird Thayer Dry Goods Co. v. Williams, 15 Fed. Supp. 938 16

Holyoke Water Power Company v. American Writing Paper Company, Inc., 68 Fed. (2d) 261 3

Holyoke Water Power Co. v. American Writing Paper Co., 9 Fed. Supp. 451 6, 16, 29

Humphrey's Executor v. United States, 295 U.S. 602 38

Lane County v. Oregon, 7 Wall. 71 33, 49

Lapina v. Williams, 232 U.S. 78 41

Lilley v. Fifty Associates, 101 Mass. 432 61

Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 61

Monongahela Navigation Co. v. United States, 148 U.S. 312 59

Page

Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405 50
New York Central R.R. v. Gray, 239 U.S. 583 61
Norman v. B. & O. R.R. Co., 294 U.S. 240 9, 12, 14, 18, 19, 34, 37, 41, 43, 44, 47, 48, 49, 50, 51, 52, 53, 57
Nortz v. United States, 294 U.S. 317 9
Ortega Co. v. Triay, 260 U.S. 103 61
Perry v. United States, 294 U.S. 330 18, 19, 20, 50, 58, 59
Trebilcock v. Wilson, 12 Wall. 687 42
United States v. Delaware & Hudson Co., 213 U.S. 366 49
United States v. LaFranca, 282 U.S. 568 49
United States v. New River Collieries, 262 U.S. 341 60
Willard v. Tayloe, 8 Wall. 557 52

Act of 1873, c. 131, 17 Stat. 424, sec. 14 20
Act. of 1873, c. 131, 17 Stat. 424, sec. 20 20
Act of 1873, c. 131, 17 Stat. 424, sec. 25 21
Act of March 9, 1933, sec. 2 (12 U.S.C.A. sec. 95a) 23
Act of May 12, 1933, sec. 43, title III 4
Gold Reserve Act of 1934, sec. 12 4
Gold Reserve Act of 1934, sec. 15 4, 24, 25
Joint Resolution (Public Resolution No. 10 of the 73d Congress) 9 *et seq.*
Legal Tender Acts of 1862 and 1863 42
Public Resolution No. 10 of the 73d Congress (Joint Resolution) 9 *et seq.*
Thomas Amendment to the Emergency Banking Act 52
United States Constitution, Fifth and Tenth Amendments 9, 11, 49, 50, 57, 59
77 Cong. Rec. 4579 55
77 Cong. Rec. 4581 55
77 Cong. Rec. 4586 55

	Page
77 Cong. Rec. 4988	39, 40
77 Cong. Rec. 4598	40
77 Cong. Rec. 4599	40
77 Cong. Rec. 5000	39
77 Cong. Rec. 5020	40
Executive Order No. 6260 (12 U.S.C.A. sec. 95, note)	23
H.R. Rep. No. 169, 73d Cong. 1st Sess.	47
Order of the Secretary of the Treasury of December 28, 1933	23, 24, 25
Order of the Secretary of the Treasury of January 15, 1934	24, 25, 28
Order of the Secretary of the Treasury of January 17, 1934	24
Order of the Secretary of the Treasury of January 30, 1934	25
Order of the Secretary of the Treasury of January 31, 1934	25
President's Proclamation of January 31, 1934	24
Provisional Regulations under the Gold Reserve Act	7, 25
Provisional Regulations, art. I, sec. 4 "	26
Provisional Regulations, sec. 42 "	26
Provisional Regulations, sec. 44 "	26
Restatement of the Law, Contracts, sec. 468(2)	61
Sen. Rep. No. 99, 73d Cong. 1st Sess.	52

In the

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 180.

HOLYOKE WATER POWER COMPANY, PETITIONER,

v.

AMERICAN WRITING PAPER COMPANY, INC.,
DEBTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR HOLYOKE WATER POWER COMPANY.

OPINIONS BELOW.

The opinion delivered by the District Court was written by District Judge Elisha H. Brewster and filed July 2, 1935. It appears on page 104 of the Record and is reported in 11 Fed. Supp. 518. In this opinion Judge Brewster referred to, and stated that he felt bound by, an earlier decision rendered by District Judge Hugh D. McLellan in a case involving rentals which became due under these same indentures before the devaluation of the dollar (R. 106). The opinion in that case was filed January 2, 1935, and is reported in 9 Fed. Supp. 451.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilson, Bingham and Morton) was written by

Wilson, J., was filed April 15, 1936, and appears at page 124 of the Record. It is reported in 83 Fed. (2d) 398.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered April 15, 1936 (R. 135). A petition for certiorari was filed in this Court on July 11, 1936, and was granted on October 12, 1936. The jurisdiction of this Court rests upon section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of the Case.

This case is before this Court upon a writ of certiorari, granted October 12, 1936, to review a final decree of the Circuit Court of Appeals for the First Circuit (R. 135) which affirmed "as to the amount of the petitioner's claim" the decree made by the District Court (R. 103) and dismissed the bill of complaint.

The case was begun by a petition brought by the Holyoke Water Power Company, an intervening creditor in proceedings for the reorganization of the American Writing Paper Company, Inc., a corporation, under section 77-B of the Bankruptcy Act, to establish the amount of rentals due to the petitioner on July 1 and October 1, 1934, and on January 1, 1935, under thirteen indentures for the lease of mill powers, in connection with certain mill sites in Holyoke, Massachusetts.

In 1859 the Holyoke Water Power Company acquired the water-power privileges on the Connecticut River at Holyoke, consisting of a dam and three levels of canals. It divided this water power into units of 16-hour mill powers, determined by a certain head and a certain rate of flow. Of these, a number were sold under indentures to various

predecessors in title of the American Writing Paper Company, Inc. The provision in fourteen of these indentures, entered into prior to 1880, for rental payable in silver bullion, was the subject of construction in the case of *Holyoke Water Power Company* v. *American Writing Paper Company, Inc.*, decided by the Circuit Court of Appeals for the First Circuit on December 15, 1933, as reported in 68 Fed. (2d) 261. The provision in thirteen other of these indentures, for rental payable in a quantity of gold or its equivalent in currency, is the subject of the dispute in this case. These thirteen indentures were executed on and between the dates September 12, 1881, and December 1, 1897, pursuant to Proposals of Sale which were expressly incorporated in and made a part of each of them.

These Proposals of Sale (R. 25-34) provided (R. 26, 27, Arts. III, VI, VII) that the Water Power Company should, under heavy penalties and liability for damages, forever maintain the dam at the head of the principal canals of such length and height as might be necessary in order to turn the water into the canals, and forever keep in good repair said canals, and from time to time remove and clear out obstructions that might accumulate therein; and that (R. 26, Art. V) "part of the consideration of every sale, and all that [was] to be allowed the grantors for the repairs, etc. by them assumed" should be secured to them in the form of a reservation of a perpetual annual rent.

The rents so reserved in the indentures, "in order to continue in the grantors an interest in common with the grantees, for the preservation and support of the mill powers" (Art. V of the Proposals of Sale, R. 26), were made payable under provisions which are admitted to have been substantially similar in each of the indentures, and of which a typical one provides for the payment of—

> "a quantity of gold which shall be equal in amount to $1500 of the gold coin of the United States of the

standard of the weight and fineness of the year 1894,* or the equivalent of this commodity in United States currency."

This rental was substituted for that (viz., 260 ounces of silver) contained in Article V (R. 27) of the proposals, in accordance with the provision contained in Article I (R. 25) for varying the terms and conditions of the proposals as the parties might agree in the deed.

The instalments of rental in question under this petition cover the calendar year 1934, and became due and payable on July 1, 1934, October 1, 1934, and January 1, 1935, as set forth in paragraph 3 of the petition (R. 4). All these dates were after the devaluation of the dollar on January 31, 1934.

The aggregate net number of troy ounces of gold .9 fine called for by the rental clauses for the three instalments here in suit is 2239.14169 (R. 16). This quantity, expressed in grains of gold .9 fine, is 1,074,788.0112 grains. Under the terms of the indentures the debtor had the option to pay the equivalent in currency of this quantity of gold instead of delivering the gold itself. Applying the measure established by the President on January 31, 1934, under authority of section 43, title III, of the Act approved May 12, 1933, as theretofore and by section 12 of the Gold Reserve Act of 1934 amended, that is, one dollar for each 15 5/21 grains, gives, under the definition in section 15 of said Gold Reserve Act (R. 72), $70,532.96 as the currency equivalent for said 1,074,788.0112 grains.

Likewise, to multiply 2239.14169 by $31.50, the price per ounce of .9 fine gold which corresponds to $35 as a price for pure gold (R. 16) gives $70,532.96. The same result is

* Various years from 1881 to 1894 were named, in all of which the standard of weight and fineness was the same, namely, 25.8 grains of gold .9 fine per dollar.

also reached by multiplying the total number of dollars mentioned in the indentures as the initial measure of the quantities of gold, *i.e.*, 45,500, by 23.22 (the number of grains of pure gold in the dollar on the dates of the indentures), dividing the product by 480 (the number of grains in a troy ounce), subtracting the number of ounces of pure gold representing the rebates (185.8348), and multiplying the result (2015.2275) by $35 (R. 14, 15). It is the latter method of computation which was employed by the cashier of the Water Power Company in making out the bills which were rendered to the Writing Paper Company, the total amounts of which thus equalled the total amount arrived at by the method above described (with the addition of $900, which it is agreed was included in the bills by mistake, R. 15).

Upon the theory of equivalency contended for by the debtor Writing Paper Company, on the other hand, based upon a value of $20.67 per ounce of gold .9 fine, the net total number of dollars payable was $42,558.48 (R. 8-10).

Cheques for the rentals which became due in July and October, 1934, in the total amount of $22,578.56, were sent to the appellant, which it collected, after expressly stating to the appellee that they did not constitute full payment.

A cheque for $19,979.93 was received by the appellant for the rentals due on January 2, 1935, which the appellant did not then deposit or collect. The appellant Water Power Company then brought this petition, praying for permission to collect the cheque so received on January 2, 1935, without prejudice to its rights to collect the balance which it alleged to be due, and for an order requiring the debtor, the appellee, to pay the balance of the full amounts of the rentals, computed at $35 per ounce of fine gold (R. 7).

It was later stipulated (R. 12) that the cheque received on January 2, 1935, for $19,979.93 might be collected by the Water Power Company without prejudice. The amounts

now sought by the appellant, therefore, represent the difference between the amounts of the cheques received by it for the rentals due on the three dates and the amounts of rental which it alleges to be due upon a basis of $1.00 for each 15 5/21 grains of gold .9 fine, or $35 per ounce of pure gold. These amounts are as follows (R. 15):

July 1, 1934	$15,129.92
October 1, 1934	207.88
January 1, 1935	13,536.68

The initial petition in the District Court, in this case, which, with its annexed appendices, is set forth in full in the Record, on pages 3 to 12, inclusive, quoted a portion of the opinion rendered by McLellan, J., in a previous action, brought before the devaluation of the dollar, in the District Court for rentals due January 2, 1934, under the same indentures as are in question here, in which that Court stated that—

> "The burden of proof is upon the plaintiff to establish his damages and the only relevant evidence submitted as to the market price of gold was the price obtainable from the Government on January 2, 1934, when by implication the price was fixed at $20.67 an ounce, or on January 17, 1934, when the price was expressly so determined by executive order. On this basis the plaintiff was entitled to receive in currency at Holyoke, Massachusetts, on January 2, 1934, the sum of $20,887.86" (R. 5).

See *Holyoke Water Power Company* v. *American Writing Paper Company,* 9 Fed. Supp. 451, at 454.

The petition then stated that, in view of that opinion and of the fact that the price which the Government Mints

would pay for gold was, on each of the dates on which the three instalments of rent were payable, $35 an ounce, the petitioner demanded of the appellee the balance due it upon the basis of that price (R. 5, 6).

The answer, briefly summarized, denied the materiality of the Provisional Regulations issued under the Gold Reserve Act of 1934, denied further that the market price of fine gold purchased by the Government on the dates in question was $35 an ounce, and alleged that the sums already paid constituted full payment of the rentals (R. 13, 14).

The Water Power Company introduced evidence (R. 14-19) of the manner in which the rentals were computed upon its theory of recovery, as outlined above. It introduced evidence also that the market price of pure gold in London was, on July 2, 1934, substantially $34.75, and that the prices on October 1, 1934, and January 2, 1935, were $34.87 and $34.79, respectively, in addition to which there would have been payable, by any purchaser of gold in London importing it into the United States, the expense of three or four cents an ounce for charges (R. 17, 18). It was testified also (R. 17) that some Americans do import gold from London and that, without a license, they could buy gold in London and have it shipped to this country, whereupon the Government would purchase it on the basis of $35 an ounce, less a small deduction for charges. It was testified also that such person could not take the gold out of the custody of the Customs authority (R. 17).

On July 2, 1935, the Court (Brewster, J.), after hearing, denied the petitioner's motion for a finding for the petitioner on the law and the evidence, granted the motion of the debtor that the petition be dismissed (R. 97), and by final decree ordered that the claim of the petitioner be established "for an amount obtained by multiplying the number of ounces of pure gold, namely, 2015.13567 by

$20.67 per ounce" (R. 103, 104). From that decree the Holyoke Water Power Company appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the decree of the District Court "as to the amount of the petitioner's claim" (R. 135), whereafter, on May 16, 1936, mandate issued to the District Court (R. 135). The petitioner thereupon brought to this Court its petition for certiorari, assigning as error, as hereinafter more particularly set forth, the affirming of the decree of the District Court as to the amount of the petitioner's claim and the decision that the rentals in question are to be discharged by the payment, dollar for dollar, of the amount which the quantity of gold named in the indentures equals in gold coin of the weight and fineness of the years specified in each indenture.

Errors Intended to be Urged.

Your petitioner respectfully submits that the Circuit Court of Appeals erred—

1. In affirming the decree of the District Court as to the amount of the petitioner's claim (R. 135).

2. In holding that the rentals in these indentures may be discharged by the payment, "dollar by dollar," of the amount which the quantity of gold named therein equals in gold coin of the weight and fineness of the years specified in each indenture, or in the indenture of March 1, 1895, by the payment of $1500 in any currency which was legal tender for public or private debts on the due dates of the rentals (R. 134).

3. In holding, in substance, that a resolution by Congress providing that contracts for the delivery of a quantity of gold as a commodity, or, in the alternative, for the payment of the equivalent of this commodity in United States currency, may be discharged by the payment, dollar for dollar, of the amount which the quantity of gold named therein equals in gold coin of a certain weight and fineness,

has a reasonable relation to the end which Congress had in view in passing the Joint Resolution (R. 132, 133).

4. In failing to hold that Congress, in the exercise of its power to regulate the currency, has interfered with contracts providing for the delivery of a quantity of gold as a commodity (if the Court was right in holding that such contracts are within the terms of the Joint Resolution) in violation of Article V and of Article X of the Amendments to the Constitution of the United States.

5. In holding (R. 130) that the rental provisions in these indentures are "gold value clauses" within the meaning of the decisions in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, and *Nortz* v. *United States*, 294 U.S. 317.

6. In holding, in substance (R. 133, l. 2 *et seq.*), that the Joint Resolution provides that all obligations that are measured in terms of gold are payable dollar for dollar in any currency which is legal tender at the time of payment.

The Questions Involved.

I. Whether the Joint Resolution provides for the discharge "dollar for dollar" of that part of the obligation which provides for the payment of rent, at the option of the debtor, by the payment of a quantity of gold bullion.

II. What is the equivalent in currency, according to the intention of the parties, of the quantity of gold bullion specified in the typical rental provision?

III. Does the Joint Resolution, or any valid legislative or executive act, prohibit the discharge of the undertaking to pay the currency equivalent which was intended by the parties?

Resolution Involved.

Public Resolution No. 10 of the 73d Congress, passed on June 5, 1933, otherwise and herein referred to as the Joint Resolution, is set forth in Appendix A annexed to this brief.

Summary of Argument.

I.

The question for determination is the measure of the debtor's liability, on three certain dates after the devaluation of the dollar, under an obligation in the alternative, to pay either a specified quantity of gold as a commodity or its equivalent in currency, at the option of the debtor.

The provision for payment in gold was impossible of performance according to its terms, and no provision for its discharge other than according to its terms was provided by law (more particularly, by the Joint Resolution of June 5, 1933).

II.

The purpose of the parties in drawing the rental provisions in the form in dispute was to provide against the effect of an appreciation or depreciation of the currency by adopting gold bullion as a medium of payment, or, at the option of the lessee, as a measure of an indeterminate amount of currency according to the ratio of equivalence between gold bullion and currency on the various rental dates. According to the ordinary meaning of "equivalence," with respect to this relation, and as evident from various legislative enactments and executive acts, the currency equivalent of gold bullion on July 1 and October 1, 1934, and on January 1, 1935, according to the intent of the remaining alternative provision, was one dollar for each 15 5/21 grains of gold .9 fine, or $35 an ounce.

III.

The debtor's duty to perform this contractual provision according to its terms has not been modified by law (more particularly, by the said Joint Resolution), for the following reasons:

1. The provision of the Joint Resolution for the discharge of certain contracts "dollar for dollar" applies only to

obligations to pay sums certain in money. This is apparent from the terms of the Resolution itself, whether read by themselves or in connection with relevant external evidence of their meaning.

2. Even if the terms of the Resolution be equivocal in this respect, they are to be construed as not referring to contracts payable in money measured by gold as a commodity, because interference by Congress with such contracts would be subject to grave doubts as to its constitutionality. Contracts employing a commodity as a standard of value are not within the field of the currency power of Congress; although, even if they be within that field, they do not exist to such extent as to obstruct the monetary policy of Congress.

3. The obligation of the particular contracts in question may not be impaired as decreed by the Circuit Court of Appeals, for the additional reason that they provide for payment for the supply of the power of artificially impounded water which your petitioner is contractually bound to furnish, in fixed amounts, in perpetuity. Payment of the currency equivalent according to the intent of the undertakings will not constitute an unjust burden upon the debtor, and so will not create a dislocation of the domestic economy to any degree whatever. By the same token, the tendency of the result which it was the design of the Congress, in enacting the Joint Resolution, to produce, must be, if the decree be affirmed, inevitably to require the Water Power Company to perform that which is economically impossible.

For these reasons, interference with the performance of these indentures would deprive your petitioner of property and would bear no reasonable relation to any legitimate exercise of power by the Congress and would constitute violation of the Fifth and Tenth Amendments to the Constitution.

If the currency equivalent for which the petitioner contends may not be recovered, it is submitted that in no event should that equivalent be determined according to the decree of the Circuit Court of Appeals, but that the decree be modified so as not to preclude recovery by the petitioner according to the actual value of the water power furnished during the rental periods in question, and to be furnished in the future.

Argument.

Inasmuch as the obligation in question is framed in the alternative, that is, in providing for the payment of either a quantity of gold or its equivalent in currency, it is necessary to examine the extent of the debtor's duty under each alternative, since the debtor is presumably entitled to avail itself of the less onerous of these. The amount of the sums already paid and received on account of the rentals here in question is equally consistent with an intention on the part of the debtor to perform either of the alternatives, and no attempt has been made by either party to establish an election by the debtor to perform one rather than the other alternative. On the other hand, the fact that it has become impossible to perform the gold bullion provision according to its terms does not serve to narrow the scope of the inquiry as to the effect of the Joint Resolution in the premises, since the operation of that enactment was plainly —and indeed chiefly—intended to embrace contracts impossible of performance, except by virtue of its provision for discharge "dollar for dollar"; for example, contracts payable in gold coin, like that in issue in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240.

I. THE JOINT RESOLUTION DOES NOT PROVIDE FOR THE DISCHARGE OF THAT PART OF THE OBLIGATION IN QUESTION WHICH PROVIDES FOR THE PAYMENT OF RENT, AT THE OPTION OF THE DEBTOR, BY THE DELIVERY OF A QUANTITY OF GOLD BULLION.

This portion of the argument is confined to a consideration of the provision for the payment of rent by the delivery of—

> "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894 . . ."

This provision, which it is agreed is typical of all the indentures under which the rentals in question became payable, is found on page 22 of the Record.

A. The operation of the Resolution is confined by its terms to obligations "payable in money of the United States."

Subsection (b) of section 1 of the Resolution reads as follows:

> "the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

Bearing in mind that we are here treating simply of the undertaking to deliver a quantity of gold, it is evident that this undertaking is unaffected, either by the declaration in the Resolution that certain contracts are against public policy, or by the provision contained therein that certain obligations be discharged "dollar for dollar." The

Resolution, so paraphrased as to embody the definition of "obligation" just quoted, would read, in its relevant portions:

> "Every provision contained in or made with respect to any obligation *payable in money of the United States* which purports to give the obligor a right to require payment in gold or a particular kind of coin or currency of the United States . . . is declared to be against public policy . . . Every obligation *payable in money of the United States* shall be discharged upon payment 'dollar for dollar' . . ."

We do not suppose that it will be seriously contended that the gold specified in the provision under consideration is "money of the United States."

The historic fact that gold has from time to time been the metallic base of the money of the United States has not the effect of constituting uncoined gold bullion "money." The terms of the express power given to Congress to "coin money" indicate the necessity of coinage to give to bullion the quality of legal tender attributed by the law, aside from its bullion value (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 304).

It seems, moreover, significant that the Chief Justice, in his opinion in that case, at page 302, took occasion to remark that the gold clauses before the Court "were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money."

It was suggested by Judge Brewster that it was evident from the debates in the Senate upon the Joint Resolution that "Congress was attempting to steer clear of constitutional difficulties by limiting the repudiation of gold clauses in public and private contracts to those calling for payment of gold as currency, and not as a commodity" (R. 107).

B. The terms of the provision for the discharge of certain money obligations "dollar for dollar" themselves necessarily restrict the operation of the Resolution to obligations payable in dollars.

Aside from the clearly restrictive effect of the above-quoted definition of the term "obligation" as used in the Resolution, the terms of the provision for the discharge of certain money obligations "dollar for dollar" themselves necessarily restrict the operation of the Resolution to obligations payable in dollars. The phrase "dollar for dollar" is, by any meaning of the language, inappropriate and inapplicable to an obligation for the delivery of a quantity of gold bullion, or of any other commodity. That the quantity of bullion specified might with greater or less ease, and by arithmetical calculation, be compared with the gold content of a number of gold dollars, does not remove the inherent inapplicability of the phrase "dollar for dollar" and the consequent conclusion that, in employing that phrase, Congress did not contemplate the discharge of obligations other than such as might have a face amount in terms of dollars.

Nor is the question affected by the inclusion in the rental provision here involved of the words "fifteen hundred ($1500) dollars of the gold coin of the United States." It was plainly the function of this phrase simply to render the magnitude of the quantity of gold being stipulated for more readily comprehensible to the contracting parties. That function might be performed, in imaginable circumstances, by stating the quantity of gold by reference to that contained in a certain strong-box, or in a certain number of Spanish doubloons of the reign of Ferdinand and Isabella: clearly such an undertaking would not be an obligation "payable in money of the United States," and yet its essential intendment would be in no degree different from that of the contracts now before this Court. If the parties

had foregone the ready means of visual comprehension afforded by the reference to gold coins, and had calculated in the beginning (as must eventually have been done before payment in any case) the number of ounces or grains of gold being contracted for, and had written the stipulation in terms for "80.625 ounces of gold .9 fine, or 72.5625 ounces of gold 1000 fine," the substance of the undertaking would have been in no respect different.

We believe the correct result upon this branch of the case to have been reached by McLellan, J., in *Holyoke Water Power Company* v. *American Writing Paper Company, Inc.*, 9 Fed. Supp. 451, at 453, in which he said:

> "The indentures contain no covenant to pay any definite sum of money. The number of dollars mentioned was the means of determining the amount of gold to be delivered or the amount of gold the equivalent whereof was to be paid in currency."

In *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 15 Fed. Supp. 938 (D.C. W.D. Mo. W.D.), decided September 19, 1936, the Court held that the Joint Resolution did not affect an obligation to pay "557.280 grains of pure unalloyed gold," saying (p. 941):

> "The Resolution applies to and affects only those obligations which are payable in money of the United States. Even if that were not the express language of the Resolution, the necessary implication from other language in the Resolution, as 'Every obligation . . . shall be discharged upon payment, dollar for dollar', etc., is that it applies to and affects only obligations which are payable in money of the United States . . . An obligation payable in fence posts or bushels of wheat or grains of gold is not payable in dollars so as to be included in the language 'discharged upon payment, dollar for dollar'."

The performance of the undertaking to pay gold bullion, if the debtor should so elect, admittedly is and was, on the dates when the rentals in question became due, impossible of performance according to its terms. It is submitted that the Joint Resolution has not the effect of requiring or permitting the discharge of that undertaking other than according to its terms. The measure of your petitioner's recovery in this case is therefore solely the debtor's duty under the alternative undertaking to pay the equivalent of the gold in currency.

II. The meaning of the term "equivalent" as used in the indentures.

It being evident that the provision for the payment of rent by the delivery of gold bullion is performable neither according to its terms nor in accordance with the provisions of the Joint Resolution, it remains solely to determine the extent of the debtor's obligation under the provision for the payment of the equivalent of the gold in currency. Before discussing the question of whether that provision may lawfully be discharged according to its terms (as of course your petitioner contends that it may and should be), it is important to determine exactly what those terms import; in other words, to inquire what it was that the parties to the indentures intended should be the equivalent in currency of the quantities of gold specified; and to that inquiry alone is this portion of the brief addressed.

A. Opinion of the Court Below.

It was stated as the opinion of the Circuit Court of Appeals that, if the Joint Resolution did not affect these indentures, "the equivalent in currency of the quantity of

gold named in these indentures for rentals would have to be determined in the devaluated dollar of 15 5/21 grains, which in the indenture under consideration would be $2539.69 at the rate of $31.50 per ounce for 80.625 ounces, nine tenths fine" (R. 129).

This ruling was not, of course, necessary to the decision, since the Joint Resolution was held to affect the contracts, but it is submitted to embody the correct view of the meaning of "equivalent," as between gold and paper currency.

B. The sense in which the parties must be taken to have employed the word "equivalent" in the indentures.

1. $1500 in devaluated paper currency would not constitute the full equivalent of the gold bullion specified in the typical indenture, according to the intention of the parties.

In the first place, it is submitted that the parties did not intend that, if the dollar should be devaluated, the currency alternative could be discharged by the payment of paper currency in an amount computed according to the ratio between gold and paper which had been abandoned. It was presumably the primary purpose of drafting the rental provision in the form now under discussion to provide for the effect of an appreciation or depreciation of the currency in circulation, in a manner similar to that adopted in the contract adjudicated upon in the case of *Ames* v. *Quimby*, 96 U.S. 324 (1877).

In this respect the contracts before this Court in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, and in *Perry* v. *United States*, 294 U.S. 330, were akin in purpose, and although the obligation here in question called for payment in gold bullion, whereas the obligation in those two of the *Gold Clause Cases* was payable in gold coin, the decisions in those cases are decisive to the effect that, if the petitioner

in this case be given, as the equivalent in currency to which it is entitled under the indentures, a sum which is equivalent to the specified quantity of gold only at the ratio between gold and currency which has now been abandoned by Congress (or one dollar in currency for each 25.8 grains of gold .9 fine), that recovery will not constitute fulfilment of the contract according to the intention of the parties.

This meaning is clearly implicit in the statement on page 302 of the opinion in the Norman case that—

> "We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed."

Unless the amounts of currency which the Court believed were intended so to be secured to the creditors were nominally greater than the face amounts of the gold coin by which they were intended to be measured, there would clearly have been no occasion for considering the effect of the Joint Resolution in the premises; payment of the face amounts in currency would have constituted full payment according to the intention of the parties.

Again, in the concurring opinion of Mr. Justice Stone in the Perry case, at page 358:

> "I do not doubt that the gold clause in the Government bonds, like that in the private bonds just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause .... In the absence of any further exertion of governmental power, that obligation plainly could not be satisfied by payment of the same number of dollars, either specie or paper,

measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our economy at the due date."

And on page 360:

". . . it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery."

We believe, then, that it is patent that it was not intended that the equivalent in currency to which your petitioner should be entitled on each payment date should be unaffected by any devaluation of the dollar; or, in other words, that the full equivalent of the quantity of gold should be only that number of dollars which should be computed according to an abandoned standard of value.

2. *The conception of equivalence, as between gold bullion and gold coin, embodied in Stat. 1873, c. 131.*

Support for the converse or positive form of the proposition just discussed need not, we submit, rest in the realm of conjecture.

Act of 1873, c. 131, 17 Stat. 424, provided, in section 20 thereof—

"That any owner of gold bullion may deposit the same at any mint, to be formed into coin or bars for his benefit; . . ."

Section 14 provided:

"That the gold coin of the United States shall be a one dollar piece, which, at the standard weight of 25.8 grains, shall be the unit of value . . ."

Section 25 provided:

> "That the charge for converting standard gold bullion into coin shall be one-fifth of one percentum . . ."

The practice intended to be set up by these provisions was obviously that an owner of bullion might deposit it at the Mint to be formed into coin of 25.8 grains to each dollar, which should then be returned to him after the deduction of the small charge made for coinage. The return of the coins to the depositor was provided for in section 45 in the following terms:

> "That when the coins or bars which are the *equivalent* to any deposit of bullion are ready for delivery, they shall be paid to the depositor, or his order, by the superintendent . . ." (italics supplied).

The obvious fact that this equivalent was based upon the number of grains of gold which were contained in the standard unit of value at that time, together with the circumstance that no express definition of "equivalent" was included in the Act, is a clear indication that the meaning of the term rested upon common usage.

At any rate, in the absence of any evidence or indication that the parties had some other conception of equivalency in mind, in the making of these indentures in the years from 1881 to 1895, it is reasonable to suppose that the conception which was embodied in the Statute of 1873 was that which they intended to embody in the indentures. If this view be accepted, the intention was such that, on the dates of payment here concerned, which were all subsequent to the devaluation of the dollar, the equivalent of the bullion called for by these indentures was that number of gold coin dollars into which that bullion could have been coined; that is, just as, in 1873, or in 1881, or in 1895, when the statutory gold content of the dollar was 25.8 grains of gold

.9 fine, the equivalent of the bullion specified in the typical indenture was $1500 in gold coin, so after January 31, 1934, when the statutory gold content was changed to 15 5/21 grains of gold .9 fine, that equivalent became $2539.69 in gold coin of the new standard. The foregoing computation rests upon a conception of equivalence which is appropriate to a consideration of the currency alternative as providing for payment in gold coin.

There is no question, of course, that the equivalent in legal tender currency of a gold dollar of the new standard is one dollar in that currency, so that the result intended would be represented by the same amount, viz., $2539.69 thereof.

The term "currency" includes both coin, whether gold or subsidiary coin, and paper currency, or fiat money (see Webster's New International Dictionary, "currency").

3. The ordinary and usual meaning of equivalence, as between gold bullion and paper currency.

If the debtor should choose to commute the quantity of bullion directly into its equivalent in paper money, the ordinary meaning of equivalence as between gold and paper would lead to the same result. Upon this basis the Circuit Court of Appeals apparently rested its conclusion that, but for the Joint Resolution, the currency equivalent of the rentals would have to be determined in the devaluated dollar of 15 5/21 grains.

A brief review of the legal situation in regard to gold which obtained up to the time when these rentals became due will illustrate the meaning which both the legislative and executive branches of the Government have given to "equivalence" as between gold, whether coin or bullion, and currency, and which, it will become patent, is the usual and ordinary meaning.

Under date of August 28, 1933, an Executive Order (No. 6260 [12 U.S.C.A. sec. 95, note]) was issued by the President in accordance with the Act of March 9, 1933 (section 2 [12 U.S.C.A. sec. 95a]), which prescribed the conditions upon which gold coin and gold bullion could be obtained or held. On December 28, 1933, the Secretary of the Treasury, pursuant to the Act of March 9, 1933, "required every person subject to the jurisdiction of the United States forthwith to pay and deliver to the Treasurer of the United States all gold coin, gold bullion and gold certificates situated in the United States owned by such person," with certain exceptions not here pertinent. This Order of December 28, 1933, also provided that "the Secretary of the Treasury will pay for the gold coin, gold bullion and gold certificates [so delivered] an *equivalent* amount of any form of coin or currency coined or issued under the laws of the United States, designated by the Secretary of the Treasury" (italics supplied).

There was at that time no other expression of the amount to be paid for gold by the Treasury; to find the measure of equivalent, then, it is necessary to go beyond the terms of this order to some other measure with reference to which it must be interpreted. It can hardly be doubted that the currency equivalent of gold coin intended to be paid under the Order of December 28, 1933, was, at that time, the face amount thereof, and that the currency equivalent of pure gold bullion was $20.67 an ounce. The statutory gold content of the dollar was at that time 25.8 grains of gold .9 fine, which corresponds exactly to the price of $20.67 an ounce 1000 fine. Thus, at the time of the making of the Order of December 28, 1933, there existed a definite and independent standard of equivalency between currency and gold, with relation to which that order was to be and could be easily interpreted. Later enactments and orders confirm the conclusion that this measure must have been understood to be the statutory gold content of the dollar.

On January 15, 1934, the Secretary of the Treasury fixed January 17th as the last day for the delivery of gold under his Order of December 28, 1933, and also prescribed that after that date there should be paid for gold turned in—

> "*only such part or none* of the amount otherwise payable therefor as the Secretary of the Treasury may from time to time prescribe and the whole or any balance shall be retained and applied to the penalty for the failure to comply with the requirements of such Order and of this Order. The acceptance of any such coin, bullion, or certificates after January 17, 1934, whether or not a part or all of the amount otherwise payable therefor is so retained, shall be without prejudice to the right to collect by suit or otherwise the full penalty provided for in section 11(n) of the Federal Reserve Act, as amended, less such portion of the penalty as may have been retained as hereinbefore provided" (italics supplied) (R. 82).

On January 17th, the last day of the period of grace thus fixed, the Secretary of the Treasury altered his previous order under which the full equivalent was to be paid for gold turned in under the Order of December 28, 1933, by prescribing that, subject to the rights reserved in his Order of January 15, 1934, as above set forth, there should be paid for gold delivered thereafter, "for such gold coin and gold certificates the dollar face amount thereof, and for gold bullion $20.67 an ounce" (R. 82, 83). This amount was still the statutory equivalent of an ounce of gold bullion, to be sure, but it was not long to remain so, as the dollar was devalued just two weeks later, when the equivalent of a dollar became, by the President's Proclamation of January 31, 1934 (R. 37), and the express definition contained in section 15 of the Gold Reserve Act of 1934 (R. 72), 15 5/21 grains of gold .9 fine, or $35 per ounce of pure

gold. It seems clear that, if the measure of the maximum price to be paid for illegally held gold bullion had continued to be its "equivalent," as provided in the Order of December 28, 1933, the automatic effect of the devaluation of the dollar would have been to raise that price to $35 an ounce, and that this change in the phraseology of the Treasury Orders relating to the amount of currency to be paid for gold was made in anticipation of the devaluation of the dollar, and in order to prevent such effect of that devaluation as would have set the new statutory equivalent of gold as the maximum amount to be paid by the Treasury under the Orders of December 28, 1933, and January 15, 1934.

The express definition of "equivalent" contained in section 15 of the Gold Reserve Act of 1934, just referred to, is as follows:

> "Wherever reference is made in this Act to *equivalents as between dollars or currency of the United States and gold,* one dollar or one dollar face amount of any currency of the United States equals such a number of grains of gold, nine-tenths fine, as, at the time referred to, are contained in the standard unit of value, that is, so long as the President shall not have altered by proclamation the weight of the gold dollar under the authority of section 43, title III, of the Act approved May 12, 1933, as heretofore and by this Act amended, twenty-five and eight-tenths grains of gold, nine-tenths fine, *and thereafter such a number of grains of gold, nine-tenths fine, as the President shall have fixed under such authority*" (R. 72) (italics supplied).

The same definition, made applicable to the Provisional Regulations issued under the Gold Reserve Act by the Secretary of the Treasury on January 30 and 31, 1934, is

found in section 4 of article I of those Regulations (R. 41), which was approved on January 30th (R. 61).

4. *An alternative measure of equivalence between gold bullion and currency which may be found to have been adopted by the parties is that amount of currency which the gold bullion should be worth in a free market.*

In the years 1881 to 1897, when these indentures were made, there was no legal restriction upon the possession of or dealing in gold in this country, and the parties may reasonably be presumed to have contemplated, as did the parties to the contract in *Ames* v. *Quimby*, 96 U.S. 324 (1877), that the value of gold in terms of money would continue to bear a relation to general prices of which the value of gold would be a convenient index. Although no free market for gold bullion in this country was open to this petitioner in 1934 or 1935 (in the absence of a license from the Secretary of the Treasury), this circumstance is immaterial so long as there did exist a market which reflected the value of gold in terms of the currency, as evidenced by dealings in gold to an enormous amount. This market was that which existed at the Mints, which, under section 42 of the Provisional Regulations issued under the Gold Reserve Act of 1934 (R. 59), paid for all gold purchased by them in accordance with Article VI of the Regulations $35 (less one-fourth of 1%) per troy ounce of fine gold and which, under section 44 of those Regulations (R. 60), charged for all gold sold under the same article $35 (plus one-fourth of 1%) per troy ounce of fine gold.

This price at the Mints represents the figure which the Treasury apparently found it necessary to pay in the new devaluated currency in order to attract gold to the Treasury, as well as the price below which the Treasury was unwilling to part with its gold. It is not necessary to show what the

relation between this mint price of gold and general prices is or was in 1934 and 1935. In *Ames* v. *Quimby, supra,* it was held that it was not necessary, in order to vary the originally stipulated price of the shovel-handles, that a change in the price of gold should have affected the general price of merchandise (see *id.* p. 327). If gold should advance more than 25% in price, that was itself, without proof of general prices, to work a change in the price of the goods. So in the present case, in which no mention was made in the indentures of general or other prices, the parties may be taken to have submitted the amount of the consideration, as a practical matter, to the value of gold, *as that value might appear in a market in which the price should represent the amount at which a willing purchaser would be willing to buy and a seller under no compulsion should be willing to sell.* Confirmation of the former price as representative of the value of gold in a free market is supplied by the fact that the world price of gold was on the dates of payment substantially the same (R. 18).

It is submitted, therefore, that the parties to the indentures should be found to have conceived of the relation of "equivalence" as resting upon either the relation between gold bullion and gold coin established by statute, or the relation between gold bullion and the currency in general likewise to be established by statute, or the value of gold in a free market in this country. Whether their intention be found to have embraced any one of these alternatives, or all three, is immaterial, since the result in this case is the same.

C. The measure of equivalence contended for by the debtor is contrary to the intention of the parties.

It has been maintained by the debtor that the currency equivalent is to be determined upon the same basis as

would be damages for the failure to perform an enforceable obligation to deliver the specified quantity of gold, and that those damages are no more than $20.67 an ounce. In so far as this contention represents simply an assertion that the law requires the equivalent so to be measured in this case, regardless of the intention of the parties, it will be dealt with hereinafter; the present inquiry is directed solely to the discovery of what must have been the intention of the parties in the premises.

From this point of view it is clearly evident that the measure of equivalency which is proposed by the debtor cannot be supported by any intention which the parties may reasonably be supposed to have entertained. It cannot be supposed that the parties intended, if the Government should constitute the possession of gold illegal, and should order the delivery up to the Treasury of all except certain exempted gold, upon the payment of an amount of money which had been the equivalent thereof when gold might legally be held, or of *such part or none* of that amount as the Secretary of the Treasury might prescribe (see Order of January 15, 1934, R. 82), that the amount which should constitute, under the contracts, the equivalent of the gold thus rendered impossible of delivery should depend upon the amount so to be fixed by the Secretary of the Treasury. This amount might, in easily imaginable circumstances,* be reduced to nothing at all; but whatever it might be, it could not be said to represent a determina-

* With the passage of time beyond January 17, 1934 (which was the date of expiration of the period of grace for the delivery of all except exempted gold set by the Order of the Secretary of the Treasury of January 15, 1934, R. 82), it becomes less and less unlikely that the Secretary of the Treasury might carry out the ominous intimation in his Order of January 15, 1934, and allow nothing for gold theretofore wrongfully held, except perhaps a remission of the other penalties for its wrongful acquisition or detention by law provided.

tion of equivalent according to any criterion of measurement which was in existence at the time the contracts were made, or which the parties may be supposed to have contemplated.

D. The measure of equivalence adopted by the Courts below.

Notwithstanding the foregoing considerations, however, the amount which was "obtainable from the government on January 2, 1934, when by implication the price was fixed at $20.67 an ounce, or on January 17, 1934, when the price was expressly so determined by executive order" for gold held in non-compliance with the previous Order to deliver up gold to the Treasury, was fixed upon by McLellan, J., in the previous case of *Holyoke Water Power Company* v. *American Writing Paper Company, Inc.*, reported in 9 Fed. Supp. 451, as the measure of your petitioner's recovery, and that opinion was adopted by Brewster, J., in the present case (R. 106, 110). Neither of those Courts, however, apparently concerned itself with the determination of what the parties had stipulated for under the obligation to pay the currency equivalent. Judge McLellan, although he assumed that the only obligation the measure of which it was necessary to determine was that which was payable in currency (9 Fed. Supp. at 453), at the same time stated (*id.* p. 454) that—

> "the burden of proof is upon the plaintiff to establish its damages, and the only relevant evidence submitted as to the market price of gold was the price obtainable from the government on January 2, 1934, when by implication the price was fixed at $20.67 an ounce, or on January 17, 1934, when the price was expressly so determined by Executive Order."

Whether or not recovery of a sum of money upon breach of a promise to pay the same constitutes recovery of damages or specific performance, it is sufficient to remark that the plaintiff in such an action is under no burden to establish his damages other than by establishing the amount of money stipulated for and the extent to which it has not been paid. Although the case before Judge McLellan involved rentals which had become payable when the statutory equivalent between gold and currency was still $1 for every 25.8 grains of gold .9 fine, Judge Brewster adopted the reasoning of that opinion, upon the theory that he was bound by it, as decisive of your petitioner's rights to the payments in this case, although the latter did not become due until after the devaluation of the dollar (R. 106-111), and although there was, on the dates when they became due, a market in this country (viz., at the Mints) at which gold was bought and sold for $35 an ounce (R. 17).

The Circuit Court of Appeals apparently recognized that the currency equivalent of the gold was, on the payment dates here in question, $1 for every 15 5/21 grains .9 fine (R. 129), although that Court was of opinion that, by force of law, your petitioner might not recover an amount so calculated (R. 134).

It is sufficient to the purposes of this portion of your petitioner's argument that it appear that the currency equivalent stipulated for is the total of those sums which, on the dates of payment, represented amounts of dollars to the number of times that 15 5/21 grains is contained in the quantities of gold .9 fine, or $35 for each ounce of fine gold, called for by the indentures. If the petitioner has demonstrated that the equivalents were intended to be calculated upon this basis, it follows from elementary principles of the law of contracts that your petitioner should

recover the difference (together with interest thereon) between the amounts so calculated and the amounts already paid, unless it can be shown that some valid legislative action prevents that recovery. That no valid legislation has the effect of preventing recovery upon this basis is the subject of the remaining portion of the brief.

III. NEITHER THE JOINT RESOLUTION NOR ANY OTHER VALID LEGISLATIVE OR EXECUTIVE ACT HAS THE EFFECT OF PROHIBITING THE DISCHARGE OF THE UNDERTAKING TO PAY THE EQUIVALENT OF THE GOLD IN CURRENCY, ACCORDING TO THE TERMS OF THAT UNDERTAKING.

It is recognized that the provision for the discharge of obligations "dollar for dollar" applies to all contracts for the payment of money, whether or not made in terms of a particular kind of coin or currency. In this respect the Resolution would embrace this debtor's obligation to pay the currency equivalent, upon the determination of the amount of that equivalent; the question upon the present branch of the case, however, is whether the Resolution is to be so applied as to affect the determination of that equivalent in violation of the intention of the parties to the contract.

A. The essential error in the decision of the Circuit Court of Appeals.

That the fundamental inquiry in this case is the measure of the debtor's liability under its undertaking to pay the currency equivalent of the gold called for was recognized by the Circuit Court of Appeals (R. 125), which apparently assumed without discussion that the provisions of the Joint Resolution for discharge "dollar for dollar" did not resuscitate the bullion alternative from the state of impossibility of performance created by the law. That Court

then, however, committed what is respectfully submitted to have been error, in not holding that the sole effect of the Joint Resolution was to provide that the equivalent in currency called for by the provision, when computed, should be discharged "dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts"; instead, it reached a result which can be explained only in one of two ways, viz.:

(1) The Circuit Court of Appeals applied the Joint Resolution, not to the provision for the payment of the currency equivalent, but to the statement of the number of dollars of gold coin used in describing the required quantity of bullion; or

(2) It applied the Joint Resolution, not to any provision of the contract which had a face value, for there was no such provision, but to the *process of determining* the face value of the currency provision, and this, not according to the intention of the parties, but according to the supposed effect of legislative and executive action.

(1) To apply the Resolution to the number of dollars of gold coin, stated as the measure of the quantity of gold, is to confuse this case with that of an undertaking to pay gold coin or its equivalent in currency. The undoubted effect of the application of the Resolution to an undertaking of the latter sort is to render performance of the currency portion of the contract nugatory, and to make dischargeable, in currency and at its face value, the obligation to pay a certain number of dollars in gold coin which would otherwise have been impossible of performance. Thus understood, it is plain that no analogy between such a case and the present case can support the effect given the Resolution by the Court below. There was no obligation to pay gold coin, and to apply the Resolution to the number of dollars of coin stated as the measure of the quantity of gold is in effect to discharge according to a complete misconception

of the Resolution that part of the obligation which we have above demonstrated is not within its purview.

(2) If the Circuit Court of Appeals applied the Joint Resolution so as to determine the "equivalent" called for by the contract, this was, it is submitted, likewise unwarranted. The operation of the Resolution upon such gold value contracts as are within its provisions is, as we have shown, such as to render nugatory the provision, express or implied, for the payment of a currency equivalent; that is, there is no provision in the Resolution which purports to dictate the process by which such an equivalent shall be determined.

It is submitted that the result of the decision of the Circuit Court of Appeals is to require discharge of the alternative provision for the delivery of gold bullion, although that provision was impossible of performance according to its terms, and was not made dischargeable "dollar for dollar" by force of the Joint Resolution, and although that Court appeared to assume that that part of the contract was not in question and was not affected by the Resolution. This the decision effects, while purporting to adjudicate solely the measure of liability under the obligation to pay the currency equivalent, the amount of which it conceded (R. 133) to be that for which your petitioner contends.

B. The plain meaning of the terms of the Joint Resolution does not provide for its application to a provision for the payment of a sum of money to be measured by a quantity of gold bullion until the amount of money has been determined.

In interpreting the Joint Resolution, apparently a rule of strict construction should apply, that is, the enactment should be given no broader scope than is required by the plain meaning of its terms: See *Lane County* v. *Oregon*,

7 Wall. 71 (1868), at 79. See also *Bronson* v. *Rodes*, 7 Wall. 229 (1868), at 254.

1. Obligations "payable in money of the United States."

As we have hereinbefore demonstrated (I, A), the effect of the definition of "obligation" which is contained in subsection (b) of section 1 of the Resolution itself is such as to exempt from the operation of the Resolution a simple obligation for the payment of a quantity of gold stipulated for as a commodity.

It is thus apparent that the word "gold," as it is used in the first sentence of section 1 of the Resolution, is to be construed as meaning "gold coin," and that therefore the words "or in an amount in money of the United States measured thereby" are to be construed, with respect to the reference to "gold," as meaning "or in an amount in money of the United States measured by gold coin."

This seems to have been the interpretation which is implicit in the statement contained on page 368 of the dissenting opinion of Mr. Justice McReynolds in the Norman case:

> "On June 5, 1933, Congress passed a 'Joint Resolution *to assure uniform value to the coins and currencies* of the United States'. 48 Stat., c. 48, p. 112. This recited that holding and dealing in gold affect the public interest and are therefore subject to regulation; that the provisions of obligations which purport to give the obligee the right to require payment in *gold coin or in any amount of money of the United States measured thereby* obstruct the power of Congress to regulate the value of money and are inconsistent with the policy to maintain the equal value of every dollar coined or issued" (italics supplied).

This interpretation of the Resolution, it is submitted, is not only the necessary result of the limitation contained in the definition of "obligation," but is in accord with the usual and ordinary meaning of the word "gold" when used with reference to payment of money; in other words, the ordinary meaning of such a phrase as "to be paid in gold" is "to be paid in gold coin." This is a natural result of the fact that, since the decision in *Bronson* v. *Rodes,* in 1868, virtually all obligations calling for payment in gold have provided in one form or another for payment in gold coin.

(There is, of course, no room or occasion for such a construction of the word "gold" where it is expressly provided by the parties, as in the indentures in the present case, that it is gold as a commodity which is stipulated.)

2. Restrictive effect of the phrase "dollar for dollar."

The words "dollar for dollar" contained in the provision for the discharge of certain contracts necessarily have the effect of exempting from the destructive operation of the Resolution contracts payable in an amount in money measured by gold as a commodity.

The effect upon an obligation payable in an amount in money measured by gold coin which was obviously intended to be created by that provision for discharge was to render nugatory the alternative obligation to pay a perhaps increased amount of money and to permit discharge of the obligation by the payment of as many dollars in other currency as the dollars in gold coin specified. In no other way within the meaning of the language used could the provision for discharge be applied to such a contract so as to achieve the result intended by Congress. Such a contract was, in other words, to be treated as if it contained no provision for the payment of an amount in other currency, and as if it were simply a contract for payment in gold coin. If a "gold

value'' clause were either express or implied, the obligation was nevertheless to be discharged by payment in any currency of the number of dollars of gold coin. Thus understood, the Resolution is again seen to be inapplicable to an obligation to pay an indeterminate sum of money measured by gold as a commodity.

3. The currency equivalent is not to be measured by gold coin.

A part of the argument for the debtor appears to contend, and the decision of the Circuit Court of Appeals appears to hold, that, even if the Joint Resolution does not affect the discharge of an obligation to pay an amount in money measured simply by gold bullion, nevertheless, in this case, the amount of currency is measured by gold coin, though only mediately, through its translation into terms of an amount of uncoined gold.

This position relies upon the fortuitous circumstance that an amount of gold coin was referred to in the indentures, but ignores the function to which that reference was clearly limited. That function was the description, once and for all, of the amount of gold bullion which was the subject of the first alternative obligation; it was not inserted as a measure of value, and consequently it was not to serve as a standard with relation to which the fluctuating value of currency should thereafter, from time to time, be determined. An obligation to deliver an amount in money measured by gold coin, in the sense of a ''gold value'' clause, states the gold coin as a measure of the value of the currency equivalent to be paid; whereas the coin in the provision under consideration is stated solely as a measure of quantity.

The fallacy in the debtor's position becomes evident if we suppose an obligation like that in question in every re-

spect except that the quantity of gold be expressed in grains rather than with reference to a number of coins. It could not be contended that such a contract called for an amount in money measured by gold coin; yet the contract here in question is of precisely the same effect.

4. This Court has not decided that an obligation to pay an amount in money measured by gold bullion is within the terms of the Joint Resolution.

Enough has been said to show that there is nothing in the decision of this Court in *Norman* v. *B. & O. R.R. Co.* which runs counter to the conclusion that the terms themselves of the Joint Resolution are not susceptible of application in the manner in which they were applied by the Circuit Court of Appeals.

As the Chief Justice remarked (at page 302 of his opinion), the gold clauses before the Court "were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars." Your petitioner, reading the foregoing remark in connection with the Court's decision that the clauses are "still hostile to the policy of the Congress and hence subject to prohibition" if treated as "gold value" clauses, has interpreted the Court's remarks as having been intentionally restricted to the case before the Court, and as having implied in no degree that an obligation, express or implied, to pay the value of gold as a commodity is likewise either within the terms of the Resolution or hostile to the policy of the Congress.

C. If, looking solely at the face of the Resolution, there be doubt whether or not its terms affect an obligation to pay the currency equivalent of a quantity of gold bullion, that doubt is removed by reference to relevant evidence beyond the corners of the act.

1. It was the sense of the debates in Congress preceding the passage of the Resolution that it was the purpose of Congress to relieve a vast number of debtors from the burden of interest-bearing obligations, in the nature of bonds and other securities, requiring them to repay, in gold coin or in amounts of money measured by gold coin, money theretofore lent to them, in so far as that burden might be greater by reason of the stipulation for gold coin.

One of the subsidiary purposes was, by removing the advantage of gold coin obligations over obligations payable in money generally, to enable the Government to borrow more money. It is submitted that the debates abundantly show that Congress gave no attention to the existence of obligations written in terms of gold as a commodity, but that, on the contrary, in so far as the question of the power of Congress to interfere with such contracts was considered by them, they intended to avoid that question.

The following extracts from the debates, which, it is submitted, are typical, are quoted as reflecting light on the general purpose of Congress and the evil which it sought to remedy by the enactment of the Joint Resolution of June 5, 1933. See *Humphrey's Executor* v. *United States,* 295 U.S. 602, at 625 (1934).

Upon being questioned by Senator Gore as to the right of the Government to take property without just compensation, Senator Borah replied:

> "That, in my judgment, has no relevancy to the subject which we are now discussing. We are discussing

contracts to pay money, to pay dollars, and Congress may compel a person to accept a dollar of a different gold content in satisfaction of a dollar of a certain gold content. A dollar is a dollar under the decree of the Government, whether it has one gold content or another. Let us keep away from commodity contracts. They throw no light on the issue here" (77 Cong. Rec. 5000).

That the subject being considered was the existence of the gold clause in obligations to repay loans of money is indicated by the following:

"Mr. Vandenberg. Was there a proposal in the committee to limit this proposition [the Joint Resolution] to new loans and not to apply it to existing contracts?

"Mr. Fletcher. There was" (77 Cong. Rec. 4988).

Upon being questioned as to the necessity for making the Resolution retroactive, Senator Fletcher replied:

". . . The situation cannot be met merely by enabling new obligations to be payable in legal tender without creating a difference in value between the old and the new obligations and impairing or destroying the market for new obligations. Investors would no doubt prefer private obligations with a gold clause to Government obligations payable in currency. In other words, we cannot make a distinction. The moment bonds or certificates or notes are offered to the public payable in legal tender, with outstanding obligations of the Government payable in gold, it will be seen that investors would rush to the gold obligations and call for that sort of security and would not take the new certificates or the new debentures or the new bonds or the new obligations. It will interfere both with finance-

ing of the Government and financing of private enterprise" (77 Cong. Rec. 4988).

"Mr. Parsons. Certainly the money changers have no right to exact from the toil of the masses a rate of interest and a principle [*sic*] of bond in a kind of money different from that which is paid to labor" (77 Cong. Rec. 4598).

"Mr. Shallenberger. Every American dollar henceforth shall have the power to discharge the debtor from his bond, and that is the power in this respect that sets us free, governments and private citizens alike. . . . Mortgages and bonds are outstanding today in the amount of more than one hundred billions which are payable in gold. . . ." (77 Cong. Rec. 4599).

In answer to questions by Senator Reed as to whether the Joint Resolution would not leave the country half off the gold standard, and, as to gold certificates, half on the gold standard, Mr. Fletcher replied:

". . . this joint resolution deals with interest-bearing obligations. It does not disturb the base of the currency, as far as that item is concerned" (77 Cong. Rec. 5020).

"Mr. Steagall. I want to ask who in this country paid in gold when they contracted with the Government or with individuals for the obligations that are made dischargeable in gold? People who bought our bonds during the war paid for them with bank credits. They paid with bank checks. People who bought our bonds and who have purchased this stupendous amount of obligations in this country did not pay for them in gold. They did not even pay for them in currency of any kind. They paid for them in bank checks."

2. The Report of the Committee on Banking and Currency may be referred to to explain the meaning of the Resolution. *Lapina* v. *Williams*, 232 U.S. 78, at 90.

As quoted in the Norman case, 294 U.S. at p. 312, this report remarked upon the two phenomena which made the enforcement of the "gold clauses" incompatible with the public interest:

> "The occasion for the declaration in the resolution that the gold clauses are contrary to public policy arises out of the experiences of the present emergency. These gold clauses render ineffective the power of the Government to create a currency and determine the value thereof. If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause. In the light of this situation two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country. Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of *securities* are expressed in a *particular form of the circulating medium*, particularly when it is the medium upon which the entire credit and currency structure rests" (italics supplied).

The reasoning of the Report, together with the particular language above emphasized, show that it was existence of securities, that is, obligations representing sums certain

payable in money of the United States, and written in terms of gold coin, both as a medium of payment and as a standard of value, with which it was the design of Congress, in passing the Resolution, to deal.

D. Congress has no power to affect the discharge, according to its terms, of an undertaking to pay an amount in money measured by gold as a commodity.

Your petitioner does in no respect relax in its contention that the terms of the Joint Resolution, whether read by themselves or in connection with the report of the Committee on Banking and Currency and the debates in Congress, are sufficient to show that Congress had no intention, in enacting the Resolution, of interfering with contracts written in terms of commodities. If, however, those terms appear to this Court to be equivocal, your petitioner submits that, since they are at least susceptible of such a construction as that for which your petitioner contends, this Court should adopt that construction in order to avoid the unconstitutional result of confirming the broad effect of the Resolution given by the decision of the Circuit Court of Appeals.

1. The adoption by private parties of a commodity standard of value is not within the field of the power of Congress to regulate the value of money.

It was the result of *Bronson* v. *Rodes,* 7 Wall. 229 (1868), and *Trebilcock* v. *Wilson,* 12 Wall. 687 (1871), that the Legal Tender Acts of 1862 and 1863 did not have the effect of interfering with the contracts of private parties in so far as they had adopted, as a standard of value, a particular kind of coin. As the Chief Justice stated in the Norman case, however—

> "The Court did not decide that the congress did not have the constitutional power to invalidate existing contracts of that sort, if they stood in the way of the execution of the policy of the congress in relation to the currency."

It has now been decided by this Court that Congress may in certain circumstances, and not improperly did in the circumstances existing on June 5, 1933, render nugatory the adoption by private parties of *gold coin* of a particular standard of weight and fineness as a standard of value for the determination of their mutual rights and liabilities (*Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240). Such contracts have a congenital infirmity by reason of the fact that they "deal with a subject matter which lies within the control of congress" (*id.* pp. 307, 308). The subject-matter which was in that case decided to be within the domain of Congress by virtue of its constitutional authority to regulate the currency was *money as a standard of value*. As the Chief Justice said in the Norman case (p. 316):

> "The Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority."

The parties to the private bonds adjudicated upon in that case had attempted to establish as between themselves a monetary system which was based upon a gold dollar which has been abandoned by the President, under the delegated authority of Congress. To allow that private monetary system to stand would have been to permit the existence, to the extent of such obligations, of a monetary system related to a kind of dollar, other than that established under authority of Congress as the sole monetary standard of value, and this in the face of the exercise of the power of Congress to destroy such a system.

The parties to those bonds had not, however, adopted, and the Court did not decide that they might not adopt, some private standard other than a monetary unit for the measurement of their mutual rights and liabilities, without bringing their undertakings within the field of federal legislation. That field, with relation to the power over the currency, is confined to the declaration of "what shall be money" and to the regulation of its value (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 303).

It is respectfully submitted that, if the parties to a contract employ as a standard of value in a contract payable in money, not a dollar of any standard of weight and fineness, not a unit of money of the United States of any period or kind, but a non-monetary unit such as, for instance, one thousand bushels of wheat, or a consolidated index of the prices of certain named commodities, or a specified quantity of gold, that standard of value, being non-monetary, is not of the subject-matter of the power of Congress over money, and should therefore be held inviolate against any attempted interference with its operation. Congress may, it is established, provide for a new means in which such an obligation may be paid, whether the money in which it was provided to be paid was gold coin or some other particular kind of coin or currency, or in money generally; this much would be an exercise of the power of Congress to provide what money shall be the *medium of payment*. Congress may in addition, in the exercise of its power over money *as a standard of value*, provide, at least within certain limits, what the relation of that which it shall declare to be the monetary standard of value shall be to the currency which is legal tender.

The present question, however, is whether Congress has a further power, that is, the power not only to regulate the medium of payment of contracts payable in money, and to provide the relation of the monetary standard to the cur-

rency, but to provide that parties may not effectually as between themselves adopt some standard other than this monetary one. That Congress has not yet attempted to interfere with such adoptions of a commodity standard of value, unless it be held to have done so by the Joint Resolution with relation to gold as a commodity, there can be no question; a contract to pay an amount in money measured by a specified amount of wheat or of iron, or by a consolidated price index, would be unquestionably outside the terms of the Joint Resolution except in so far as the *medium of payment* might be altered.

It is submitted that the power to regulate the currency is adequately founded upon the power to dictate what the standard monetary unit of value shall be from time to time, and to protect and maintain, within perhaps certain limits, the stability of the relation between that unit and commodities in general. It is at least seriously questionable, however, that it is proper for the Congress, not only to act within this field, but to go further and to interfere with private arrangements based upon standards of value which are not monetary, and which must in their nature therefore be subject to the inconveniences, uncertainties and disabilities peculiar to their particular subject-matter. A contract payable in an amount of money to be measured by a commodity is uncertain as to amount and is undoubtedly therefore non-negotiable. Moreover, the determination of that amount must involve some, and perhaps a considerable amount of, clerical labor and even research. The value of any particular commodity is subject to fluctuations which are only partially affected by changes in the value of money generally with respect to the general level of all prices. It is presumably for this latter characteristic that they have been employed even to the small extent that they have been employed. It is evident, therefore, that the parties to such a contract have, in foregoing the em-

ployment of a monetary standard for the determination of their mutual rights, created an obligation of essentially different characteristics from a contract of which the subject-matter is a monetary standard of value. In the opinion in *Ames* v. *Quimby*, 96 U.S. 324 (1877), the Court upheld a contract which employed gold as a commodity as a standard of value, without any intimation that a consideration of the subject necessitated any comparison with gold coin contracts or reference to the leading case of *Bronson* v. *Rodes*, which, if the debtor's position here were correct, would have been regarded as at least relevant to the discussion.

2. *Even if the contractual adoption of a non-monetary standard of value is not per se beyond the domain of the currency power of Congress, it may be seriously doubted whether interference with such an adoption would, on June 5, 1933, have had a reasonable relation to the end which Congress then had in view.*

The Circuit Court of Appeals (R. 132) appeared to concede that contracts of the type in question here "might interfere with the constitutional power to regulate currency in a much lesser degree than the gold clause in corporate bonds or in gold certificates," but stated that "Congress has made no exception of unusual contracts, such as these indentures, which alone may have only slight effect on the constitutional power to regulate the currency of the country." That Court then held that it could make no exception of such contracts from the operation of the Joint Resolution, because Congress had made none. It is respectfully suggested, nevertheless, that the exception which it is here sought to establish by virtue of the commodity nature of the contracts may be found to have been provided by Congress by virtue of the limitation of the Resolution by

its terms to obligations "payable in money of the United States." We submit that we have demonstrated that the effect of this limitation may be found to dictate that construction of the word "gold," as used in the Resolution, which would confine the interference of the Resolution with contractual standards of value, as distinguished from the media of payment, to the adoption, as standards of value, of units of coin or currency.

Neither the existence of a large number of obligations calling for payment in gold coin nor the occasion for the exercise of the undoubted power of the Congress "to endeavor to conserve the gold resources of the Treasury, to insure its command of gold in order to protect and increase its resources, and to prohibit the exportation of gold coin for its use for any purpose inconsistent with the needs of the Treasury" (Norman case, 294 U.S. at 313) has any relation, it is submitted, to obligations payable in any kind of currency, such as are at this point under discussion. Since the payment of such contracts does not require the use of gold, they constitute no danger to the Treasury's command of that metal.

Moreover, the reason which this Court stated to justify modification of the "gold clauses" in issue in the *Railroad Bond Cases* if treated as "gold value" clauses, are not applicable to contracts for the payment of an amount of money measured by gold as a commodity, for the reason that contracts payable in an amount of money measured by a commodity do not exist to an appreciable extent. Of this fact there is no direct proof in this case. It is submitted, however, that it is a circumstance of which this Court may take judicial notice. The report of the Committee on Banking and Currency of the House of Representatives recommending favorable action upon the Joint Resolution (H.R. Rep. No. 169, 73d Cong. 1st Sess.) contained the statement:

> "If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country *virtually all obligations,* almost as a matter of routine contain the gold clause, . . . Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of securities are expressed in a *particular form of the circulating medium* . . ." (italics supplied).

That this report is to be read as dealing with interest bearing securities payable in gold coin is clearly inferable from its terms, and that this Court so understood the report appears from the following language of the Chief Justice in the Norman case, at page 313:

> "The estimates submitted at the bar indicate that when the Joint Resolution was adopted there were outstanding seventy-five billion dollars or more of such obligations, the annual interest charges on which probably amounted to between three and four billion dollars. It is apparent that if these promises were to be taken literally as calling for actual payment in gold coin, they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin."

It is respectfully submitted that the effect of the decree of the Circuit Court of Appeals is to strike down the express contracts for payment of the full equivalent of the gold bullion in return for the use of the petitioner's property (see *Norman* v. *B. & O. R.R. Co.,* 294 U.S. at 307; *Atty. General* v. *Old Colony R.R.,* 160 Mass. 62 (1893)),

and that, since these contracts have not the congenital infirmity inherent in contracts dealing with the value of the monetary unit (see Norman case, *id.* at pp. 307 and 308), such interference therewith is a deprivation of its property without due process of law in contravention of the 5th Amendment to the Constitution (see *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1922)), and since, in any case, these contracts constitute no interference whatever with any legitimate exercise of power by Congress, the effect given by the decree of the Circuit Court of Appeals to the Joint Resolution and other legislation of Congress is in contravention of the 10th Amendment to the Constitution.

Even if your petitioner has failed to show that an application of the Joint Resolution which would interfere with obligations payable in money measured by gold as a commodity would be unconstitutional, it is submitted that there is at least a grave doubt as to whether such interference would be constitutional, and that therefore this Court should adopt that construction which will avoid such doubt.

See *United States* v. *Delaware & Hudson Co.,* 213 U.S. 366, at 407 (1908);
United States v. *LaFranca,* 282 U.S. 568, at 574 (1930).

Even if this Court should be of opinion that no grave doubt exists as to the constitutionality of including, within the operation of the Joint Resolution, contracts payable in money measured by gold as a commodity, it is submitted that, since the Resolution may (as the petitioner contends that it should) be construed so as not to include such contracts, it should be so construed in order to avoid giving any greater effect to the Resolution than is clearly required by its terms (see *Lane County* v. *Oregon,* 7 Wall. 71 (1868), at 79), especially where such contracts constitute no interference with the monetary policy of Congress.

E. The Joint Resolution, if so applied as to permit the discharge of these contracts under the decree of the Court below, bears no reasonable relation to the exercise of the powers of Congress over the currency, by reason of the perpetually executory nature of these contracts, and therefore would contravene the Fifth and Tenth Amendments to the Constitution.

We have attempted to demonstrate the inviolability of the obligations here in question which inheres in their nature as dealing with a commodity standard of value. If there seems to this Court to be even a grave doubt upon that score, the decree of the Court below should be modified so as to permit the discharge of these obligations according to their terms. If it seems to the Court that there is no such doubt, it is further urged that these obligations are inviolable by reason of additional characteristics which, it is submitted, remove them from the sphere of federal control. Your petitioner asks this Court to decide that a federal interference which may be valid as applied to contracts for the repayment of money lent, even if the amount of money be measured by gold as a commodity, should nevertheless be held invalid if applied to one side of a bilaterally executory contract for the maintaining of a dam, canals and other works to provide water power in perpetuity for a stipulated rental, such as the contracts here involved (R. 26, 27).

Presumably, the validity of the enactment as applied to contracts of this type may be judged apart from its validity with reference to the different facts involved in the case of *Norman* v. *B. & O. R.R. Co.* *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, at 289; *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, at 415; *Perry* v. *United States*, 294 U.S. 330.

Although water power is technically in the nature of real estate, an undertaking to supply water power produced by the artificial impounding of water by a dam and a system of canals, such as exists at Holyoke, is in effect an undertaking to supply constant human labor and attention and the use of many various commodities and materials to be purchased in the market. The maintenance of the physical plant in a state of repair and the supervision of its functioning in such a way as to meet the varying demands of the water power lessees consequently require the constant expenditure of money, the source of which, it is apparent, must be the income derived from the furnishing of the power. It would be not substantially inaccurate to contemplate the relation between the Water Power Company to its lessees as that of agent to as many principals, in the sense that for their common benefit the various mill owners virtually employ the Power Company organization to perform for them the necessary engineering, clerical and other work required by the diversion of the water of the Connecticut River to their several manufactories. If, now, the Congress be held to have the power to reduce the consideration which the lessees undertake to pay the Water Power Company for the furnishing of these services, the obligation to furnish which remains undiminished and unaltered, it is submitted that such a result would constitute, not an unjust burden upon the debtor, but, on the contrary, an unjust and possibly unbearable detriment to the business of your petitioner. In this aspect of the case it will be seen that to the extent that the Joint Resolution may be justified as to ordinary "gold clause" obligations, such as were in question in *Norman* v. *B. & O. R.R., supra,* by reason of the dislocation of the domestic economy which would result from the devaluation of the dollar with respect to debtors whose income would not have risen to meet the increase, that justifica-

tion exists in no degree in the present case. On the contrary, the perpetual feature of these contracts must, if the decree of the Circuit Court of Appeals be affirmed, necessarily have the effect of assuring to the debtor, at least as long as the resources of your petitioner can continue to contribute to it, a benefit to which in equity it would not be entitled. See *Willard* v. *Tayloe*, 8 Wall. 557. It is, of course, not the purpose of this part of the argument to rest your petitioner's position upon a claim for an equitable adjustment of the mutual rights of the parties, but simply to point out that to the extent that Congress may have been frustrated or embarrassed in carrying out its monetary policy of 1933 and 1934 by the prospect of creating unjust burdens upon "gold clause" debtors, including the Government itself, by any devaluation of the dollar, it could have been in no degree embarrassed by the existence of such obligations as are in question in this case.

It was one purpose of Congress, in the enactment of the Joint Resolution and of the related currency legislation of 1933 and 1934, to bring about by congressional action, and particularly by the devaluation of the dollar, which was, on June 5, 1933, in prospect (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. at 314), a general rise in the level of commodity prices. The Joint Resolution was considered necessary to remove doubt as to the construction of the Thomas Amendment to the Emergency Banking Act (Sen. Rep. No. 99, 73d Cong. 1st Sess., quoted in footnote, *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 314). The purpose of that amendment was stated by the Senator who presented it to be "the bringing down or cheapening of the dollar, that being necessary in order to raise agricultural and commodity prices . . ." (see opinion of Mr. Justice McReynolds in the *Gold Clause Cases*, 294 U.S. at 373, 374). The effect of this policy may already be seen; its full effect, however, has by no means yet exerted

itself, and it may be expected that, in accordance with well-known principles of economics, the tendency of the Government's monetary policy, of which the Joint Resolution is a part, will be to raise the price level in roughly the proportion to which the gold content of the dollar has been reduced. Due to the operation of other factors, the price level may not attain a proportionately high point, whereas, on the other hand, its response to the currency manipulation in connection with other factors may carry it beyond that point; it is sufficient to point out that the manipulation of the currency by Congress must inevitably, in some degree, have the effect of raising the prices of the various building materials necessary for the maintenance of the water power plant, the wages and salaries of those employed in that maintenance and in the supervision and operation of the system, and inevitably also the taxes which must be paid upon the property. To be sure, in the case of contracts only one side of which remains to be discharged, and this by the payment of a single sum of money in the relatively near future, the payment of the increased number of dollars resulting from the devaluation of the dollar might well constitute unjust enrichment, and might for that reason, and in connection with the existence of a large number of such obligations, cause some dislocation of the domestic economy. As the Chief Justice pointed out in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 315, if the income out of which the obligors of bonds must meet their obligations be determined by the new standard while their indebtedness be met by an amount of currency determined by the former gold standard, their receipts will be fixed on one basis while their interest charges and the principal of their obligations will be fixed on another. It is significant, however, that these observations are not applicable to the situation created by the indentures here in question. These indentures require the performance of

services by the Water Power Company in perpetuity, for which reason it may not be assumed, in balancing the distribution of burdens between the parties, either that taxes and costs of operation will remain substantially the same, or that the income of the debtor Writing Paper Company may not tend to increase in proportion to the increased burden of paying the rental obligations. It matters not that the debtor's income may not yet have so increased, or that your petitioner's charges have not yet increased to the full extent that may be expected; the significant fact is that on June 5, 1933, those possibilities were inherent in the situation, so that the Resolution enacted on that day must be held ineffective to remake the agreements between these parties.

The situation now before this Court finds some analogy in the facts before the Court in *Addy* v. *United States,* 264 U.S. 239 (1923), in which a certain order relating to the sale of coal, made under authority of the Lever Act, was construed as not embracing the sale of coal which had been purchased before the date of the order. The Court said, (p. 245):

> "The order *treated buying and selling as integral parts of the regulated transaction* and made no reference to expenses incident thereto. If it applied only to transactions thereafter begun, all had opportunity to govern themselves accordingly; but, if given retroactive effect, jobbers who had negotiated purchases at costs exceeding fifteen cents per ton would necessarily lose if they sold, although they had acted in entire good faith" (italics supplied).

That Congress did regard the lending of the money for which gold clause obligations were given, and the payment of those obligations, as integral parts of the transactions to be affected by the enactment of the Joint Resolution is

indicated by the following language of Representative Steagall during the debate upon the Joint Resolution:

> "Who can defend the moralities of a transaction in which a citizen incurs an obligation that may be discharged by one day of labor and through manipulation or other causes beyond his control this citizen finds it takes two days of labor to discharge this same debt? I repudiate as dishonest a dollar that presses down upon the struggling people of this country in such fashion" (77 Cong. Rec. No. 62, p. 4586).

The emphasis of this same consideration was placed by Mr. McGugin of Kansas upon the creditor's position in the following words:

> "In the first place this so-called 'gold clause' was a Shylock provision in the contract. The creditors did not lend gold in the first instance. They lent currency and bank credits. So in the light of fairness and decency they have no moral right to request the repayment of a dollar different than the dollar which they lent" (*ibid.* p. 4579).

To the same effect, Mr. Greenwood: ". . . The probabilities are that most of the purchasers who purchased the obligations of the government paid for them with lawful money of the United States and they will be paid with the same kind of money with which they purchased the obligation in the beginning" (*ibid.* p. 4581). A similar statement by representative Steagall was greeted with applause (*ibid.* p. 4586).

In this view of the situation, the effect of the Joint Resolution which is contended for by the Writing Paper Company would create a situation to which the remarks of this Court in *Adkins* v. *Children's Hospital*, 261 U.S. 525,

are strikingly apposite. In holding invalid a minimum wage law as an interference with freedom of contract which could not be justified under the Constitution, the Court said (p. 557):

> "The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. . . . It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter *must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply* (italics supplied).

Those remarks have even greater force if applied to the situation now before this Court, for the reason that your petitioner is legally bound, and in perpetuity, to furnish the performance for which it is to receive, if the decree of the Circuit Court of Appeals be affirmed, only the consideration to which it would be limited by congressional action; whereas it did not, in the Adkins case, appear but that those within the terms of the law were to some extent free to escape its operation by refraining from the employment of women to which it related.

If, then, discharge of the debtor Writing Paper Company's obligation according to the decree of the Circuit Court of Appeals must place upon this petitioner an economic burden analogous to, and indeed even more onerous than, that which led this Court to invalidate the minimum wage law in question in *Adkins* v. *Children's Hospital* (*supra*), it is patent that the justification for upholding congressional mitigation of obligations for which the consideration had already been given is utterly without relevance with reference to the case now before this Court. Obligations binding the debtor to pay for a consideration not rendered at the time the Joint Resolution was passed, and which must be rendered in perpetuity, did not constitute elements of economic dislocation in the event of devaluation, so that diminution of the measure of the debtor's liability under such obligations bears no reasonable relation to the monetary policy adopted by Congress (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 313), and is contrary to the Fifth and Tenth Amendments to the Constitution of the United States.

F. No legislation or executive action other than the Joint Resolution has the effect of reducing the currency equivalent stipulated for.

It is stated in the opinion of the Circuit Court of Appeals (R. 134) that the conclusion reached by that Court rested, not only upon its construction of the Joint Resolution, but upon what it conceived to be the intent of the Government "as expressed in the several executive orders and proclamations of the President and Secretary of the Treasury . . . and Acts of Congress above referred to . . . " Morton, J., concurred in the opinion on the ground that the case was "within the scope of the decisions and opinions in the Gold Clause Cases . . ." Similarly, the debtor Writ-

ing Paper Company has contended that the decision of this Court in *Perry* v. *United States*, 294 U.S. 330, has the effect, apart from the Joint Resolution, of limiting this petitioner to recovery according to the measure of what was held to be the "equivalent" of the gold coin stipulated for in that case. Your petitioner contends that there is nothing in any of the several executive orders and proclamations of the President and Secretary of the Treasury or the Acts of Congress referred to by the Circuit Court of Appeals, or in the decision in the Perry case, which may be given the effect of interfering with the discharge of these rental provisions.

In the first place, while, as we have attempted to show, there is no question of damages in the present case, but simply the question of what amount in currency the parties intended should make up the equivalent of gold bullion in such a situation as now exists, the result of the Perry case rests upon a determination of the plaintiff's damages, and for breach of a valid obligation to pay a fixed sum in gold coin. This Court said, to be sure, that " 'equivalent' cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used," but it has seemed to your petitioner, particularly in view of the inclusion of the term "equivalent" within quotation marks, and of the fact that the term was apparently employed by the Court in answering a contention of the petitioner which rested upon supposed implications of that term, that this Court by no means meant to decide that in no event, and in no sense of the word, might the equivalent of gold coin, much less of gold bullion, be ascertained in any other manner. Moreover, the value of the gold coin which this Court found to be the measure of the plaintiff's damages was expressly stated to inhere in that coin as "legal tender and as a medium of exchange under a single

monetary system with an established parity of all currency and coins'' (*Perry* v. *United States,* 294 U.S. 330, at 357).

Thus to hold that the value of the gold coins stipulated for in the Government bonds in the Perry case, if they had been paid to the plaintiff, was no more than the same nominal amount in dollars of another kind was by no means tantamount to a decision that the value of a specified amount of gold bullion on the rental dates here in question would likewise have been no more than if that bullion had been minted into coins of the old gold content.

In so far as a determination of the value, or equivalent in currency, of gold bullion on the rental dates here in question may be based upon a supposition that it have been delivered to your petitioner on those dates, it is submitted that such a supposititious state of facts does not place your petitioner in the position of one who had held gold bullion at the time when it was ordered to be turned in to the Treasury upon payment of its then equivalent.

If any valid legislative act or executive order made thereunder were held to affect the determination of the value, or the equivalent in currency, of the gold bullion in these contracts as of the rental dates in 1934 and 1935, it is submitted that, in so far as any such act or order may purport to measure such value, or equivalent, as of any date prior to such dates, and as of a date when the value, or equivalent, of gold bullion was $20.67 per ounce, such act or order would in effect operate to take the property of your petitioner without having provided for judicial determination of the compensation to be given therefor, and would therefore in that respect violate the Fifth Amendment to the Constitution of the United States (*Monongahela Navigation Co.* v. *United States,* 148 U.S. 312 (1892), at 327).

Although the suggestion has not heretofore been made in the course of these proceedings, your petitioner respectfully suggests to this Court that, if it cannot find that the

currency equivalent to be decreed to the petitioner is to be measured according to the devaluation of the dollar, the petitioner should nevertheless not be remitted to an equivalent based upon a measure analogous with that employed in the Perry case, but should be held to be entitled to the fair value of the consideration which it has furnished during the rental periods here in question (see *United States* v. *New River Collieries*, 262 U.S. 341 (1922), at 344). The "equivalent" to which Perry was held to be enfitled was in substance representative of the consideration to which he was entitled for a previous loan of dollars to the United States. The obligation to pay that "equivalent" was, moreover, drawn in terms of the monetary medium, which it was not shown had depreciated in value at the time of the decision.

In the present case, on the other hand, the equivalent sought by the petitioner represents consideration for the supply of water power after the date of the Joint Resolution, and a decree in the form given by the Circuit Court of Appeals (R. 134) may be held not only to limit your petitioner to a legally reduced currency equivalent of the rentals payable on July 1 and October 1, 1934, and on January 1, 1935, which are immediately in question here (R. 4, paragraph 3 of the petition), but to foreclose the right of your petitioner to recover any greater equivalent with respect to any rentals to become due in the future, no matter to what extent the purchasing power of the dollar may decrease.

See *Bigelow* v. *Windsor*, 1 Gray, 299 (1854).
Case v. *Mountain Timber Co.*, 210 Fed. 565 (D.C. W.D. Wash. 1914).

It is therefore respectfully submitted that, if this Court cannot grant recovery according to the measure of equivalency contended for by the petitioner, it should, rather

than remit the petitioner to the measure adopted by the Court below, find that the legal situation surrounding the possession of and dealing in gold on the dates of payment had no counterpart in what the parties intended, and that it is therefore impossible to determine the equivalent in the light of that intention.

In this respect the situation could be compared with that which would exist if the debtor had contracted to deliver, not gold bullion, but Russia Sables iron (see *Lilley* v. *Fifty Associates,* 101 Mass. 432 (1869)) or its equivalent in currency, and if all supplies of Russia Sables iron should thereafter become exhausted and impossible to procure. In such a situation the debtor must pay the value of the water power the right to which it has enjoyed. See Restatement of the Law, Contracts, sec. 468(2).

No evidence of the actual value of the water power furnished by the petitioner during the rental periods here in question was introduced in this case, inasmuch as the petitioner has based its claim for recovery upon what it believes to be the correct construction of the indentures, with the performance of which no legislative or executive act should be held to have interfered. If, however, this Court should not support the petitioner's contention, it is respectfully suggested that, rather than affirm the decree of the Circuit Court of Appeals, this Court indicate that the provisions for payment of the rentals having become impossible of performance or of ascertainment, this petitioner is not to be taken as precluded from recovering the value of its performance in some other appropriate form of action. The way to such an indication is marked by the expressions of this Court in *Louisville & Nashville R.R.* v. *Mottley,* 219 U.S. 467 (1911), at 486; *New York Central R.R.* v. *Gray,* 239 U.S. 583 (1916), at 587; *Ortega Co.* v. *Triay,* 260 U.S. 103 (1922), at 110.

Conclusion.

We respectfully submit, therefore, that the decree entered by the Court below is erroneous, and pray that it be reversed, and that the Circuit Court of Appeals be directed to enter a decree requiring payment of such sum as represents the equivalent in currency of the quantity of gold bullion named in the indentures according to the measure of equivalency stated by that Court in its opinion to be correct, if the Joint Resolution did not apply to these contracts, or one dollar for each 15 5/21 grains of gold .9 fine.

Respectfully submitted,

BENTLEY W. WARREN.

Nathan P. Avery,
James M. Healy,
Donald C. Starr,
Of Counsel.

Appendix A.

Joint Resolution of Congress of June 5, 1933.

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby

repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

" 'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

"Approved, June 5, 1933, 4:40 p.m."